Employment Standards TRIBUNAL

Citation: Steven J. Moxness (Re)
2021 BCEST 77

EMPLOYMENT STANDARDS TRIBUNAL

An Application for Reconsideration

- by -

Steven J. Moxness carrying on business as Amplified Audio Visual Solutions
("AAVS")

- of a Decision issued by -

The Employment Standards Tribunal
(the "Tribunal")

pursuant to section 116 of the
Employment Standards Act R.S.B.C. 1996, C.113 (as amended)

PANEL: Carol L. Roberts

FILE No.: 2021/071

DATE OF DECISION: September 2, 2021

DECISION

SUBMISSIONS

Steven J. Moxness	on his own behalf carrying on business as Amplified Audio Visual Solutions

OVERVIEW

1. This is an application by Steven J. Moxness carrying on business as Amplified Audio Visual Solutions ("AAVS" or "Employer") for a reconsideration of 2021 BCEST 63 (the "Original Decision"), issued by a Tribunal Member (the "Member") on July 14, 2021.

2. The Member dismissed AAVS' appeal against a Determination of the Director of Employment Standards (the "Director") finding that AAVS had contravened the *Employment Standards Act* (the "*ESA*"). The Director determined that AAVS owed wages and interest to a former employee (the "Employee") in the total amount of $16,630.14 and imposed nine administrative penalties for the contraventions.

ISSUES

3. The two issues before me on this reconsideration application are:

    1. Does this request meet the threshold established by the Tribunal for reconsidering a decision?
    2. If so, should the decision be cancelled or varied or sent back to the Member?

ARGUMENTS

4. AAVS argues that there were a number of errors in the Original Decision, and that the Director erred in law "by ignoring the *ESA* on this decision." The errors, as alleged by AAVS, are the Director's findings regarding the Employer's regular office hours, the finding that AAVS was aware that the Employee worked outside of regular office hours, that AAVS submitted documents, including electronic transfer printouts, and that a mediation session was scheduled but did not occur. AAVS also argues a number of errors of law. From the context of the submissions, it appears that AAVS' argument is that the Member erred in law in confirming findings of the Director.

ANALYSIS

5. The *ESA* confers an express reconsideration power on the Tribunal. Section 116 provides

    (1) On application under subsection (2) or on its own motion, the tribunal may

        a) reconsider any order or decision of the tribunal, and

        b) confirm, vary or cancel the order or decision or refer the matter back to the original panel or another panel.

1. The Threshold Test

6. The Tribunal reconsiders a decision only in exceptional circumstances. The Tribunal uses its discretion to reconsider decisions with caution in order to ensure finality of its decisions and to promote efficiency and fairness of the appeal system to both employers and employees. This supports the purposes of the *ESA* detailed in section 2 "to provide fair and efficient procedures for resolving disputes over the application and interpretation of this Act."

7. In *Milan Holdings* (BC EST # D313/98), the Tribunal set out a two-stage analysis in the reconsideration process. The first stage is for the Tribunal to decide whether the matters raised in the application for reconsideration in fact warrant reconsideration. The primary factor weighing in favour of reconsideration is whether the applicant has raised questions of law, fact, principle or procedure which are so significant that they should be reviewed because of their importance to the parties and/or their implications for future cases. The reconsideration panel will also consider whether the applicant has made out an arguable case of sufficient merit to warrant the reconsideration.

8. The Tribunal may agree to reconsider a decision for a number of reasons, including:

- The member fails to comply with the principles of natural justice;
- There is some mistake in stating the facts;
- The Decision is not consistent with other Decisions based on similar facts;
- Some significant and serious new evidence has become available that would have led the member to a different decision;
- Some serious mistake was made in applying the law;
- Some significant issue in the appeal was misunderstood or overlooked; and
- The Decision contains a serious clerical error.

(*Zoltan Kiss*, BC EST # D122/96)

9. While this list is not exhaustive, it reflects the practice of the Tribunal to use its power to reconsider only in very exceptional circumstances. The reconsideration process was not meant to allow parties another opportunity to re-argue their case.

10. After weighing these and other factors, the Tribunal may determine that the application is not appropriate for reconsideration. Should the Tribunal determine that one or more of the issues raised in the application is appropriate for reconsideration, the Tribunal will then review the matter and make a decision. The focus of the reconsideration member will in general be with the correctness of the decision being reconsidered.

11. In *Valoroso* (BC EST # RD046/01*),* the Tribunal emphasized that restraint is necessary in the exercise of the reconsideration power:

> .. the Act creates the legislative expectation that, in general, one Tribunal hearing will finally and conclusively resolve an employment standards dispute…

12. There are compelling reasons to exercise the reconsideration power with restraint. One is to preserve the integrity of the process at first instance. Another is to ensure that, in an adjudicative process subject to a strong privative clause and a presumption of regularity, the "winner" is not deprived of the benefit of an adjudicator's decision without good reason. A third is to avoid the spectre of a tribunal process skewed in favour of persons with greater resources, who are best able to fund litigation, and whose applications will necessarily create further delay in the final resolution of a dispute.

Has the Applicant met the first stage of the Milan reconsideration test?

13. I find that AAVS has not raised significant questions of law, principle or procedure. AAVS' submissions are largely a repetition of the arguments made to the Member on appeal as well as before the Director's delegate.

14. In the Determination, the delegate noted that the parties disagreed on AAVS' regular office hours but found as a fact that the regular office hours were from 8:30 am to 5:30 pm. AAVS says that the Employee determined her hours of work and that there were no regular office hours. This is the same argument AAVS made before the delegate and before the Tribunal. The Member did not make a mistake in stating the facts.

15. AAVS also submits that the Member's statement that it was aware the Employee worked outside of the regular office hours was erroneous. AAVS also advanced this argument before the Director at first instance as well as the Member on appeal. The Member wrote that the parties submitted wage statements supporting their positions regarding both the hours the Employee worked as well as her wages. The Member referenced an employer's obligations under section 35 of the *ESA* and found that, in the absence of reliable Employer records, it was reasonable for the Director to rely on the Employee's records to determine wages owing. AAVS has not established a mistake on the part of the Member, either in stating the facts or applying the law.

16. AAVS contends that the Member erred in stating that it produced documents, including electronic transfer printouts, as well as stating that a mediation was scheduled but did not occur. Whether or not the Member erred in either of these statements, it is unclear how the statements raise any questions of law or had any effect on the Director's conclusions. I am unable to ascertain any basis for the exercise of the reconsideration power.

17. AAVS also appears to argue that the Member erred in upholding the Director's conclusion that it had contravened section 21 of the *ESA*. AAVS contends that the documents it submitted on appeal demonstrated that the Employee had agreed, in writing, to certain deductions from her wages.

18. The Member stated (at paragraph 42 and 43 of the Original Decision):

> The Director found that, although the Employee's version of events was not credible, the deductions were nonetheless in contravention of section 21 of the *ESA*.
>
> With respect to the deductions, I find that the Director did not err in law in finding that Amplified Audio contravened section 21 of the *ESA.*

19. Section 21 of the *ESA* provides:

> 1) Except as permitted or required by this Act or any other enactment of British Columbia or Canada, an employer must not, directly or indirectly, withhold, deduct or require payment of all or part of an employee's wages for any purpose.
>
> 2) An employer must not require an employee to pay any of the employer's business costs except as permitted by the regulations.
>
> …

20. AAVS made a number of deductions from the Employee's pay that did not comply with the requirements of section 21. The Director found that a separate agreement entered into by the Employee and a third party, in which AAVS could deduct wages earned to repay AAVS for wages she earned at the third party, to be "fundamentally illegal." Section 4 of the *ESA* provides that parties cannot contract out of the minimum standards prescribed by the *ESA*. Even if the Employee agreed to these deductions, that agreement, being contrary to the *ESA*, was unenforceable.

21. Although the Member did not provide extensive reasons for concluding that the Director had not erred, I am not persuaded that she misunderstood or misstated the facts or made a mistake in applying the law.

22. Absent any error on the Member's part, there is no basis to exercise the reconsideration power.

23. I find that the reconsideration application is an attempt to re-argue the case advanced before the Member on appeal. I conclude that it does not raise issues of serious importance to the parties or have implications for future cases.

ORDER

24. The application for reconsideration is dismissed.

Carol L. Roberts
Member
Employment Standards Tribunal